No. 14366

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND J. VEELIK,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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This action was filed by the plaintiff, Raymond J. Veelik, under and by virtue of the provisions of the Federal Employers Liability Act, Title 45, U. S. C. A., Section 51, *et seq.* This is an appeal by the plaintiff Raymond J. Veelik from the judgment rendered by the jury [Clk. Tr. p. 15] in his favor in the sum of $2,000.00, and from the order of the court denying said plaintiff's motion for new trial on March 1, 1954 [Clk. Tr. p. 18]. The action was one for damages for personal injuries sustained by the plaintiff on the 14th day of September, 1952, as a result of a railway train accident while said plaintiff was employed as a fireman by the defendant. The defendant admitted liability in the answer, but denied, for lack of sufficient information or belief, the injuries alleged to have been

sustained, but admitted that plaintiff's earnings were on the average of $500.00 per month [Clk. Tr. p. 12]. It was subsequently stipulated between the parties that the sole issue to be tried was "* * * the fact of, nature and extent of injuries and damages to the plaintiff * * *" [Clk. Tr. p. 13].

I will state in narrative form the evidence which was given and will disregard all conflicting evidence and all evidence which contradicts the evidence in favor of plaintiff.

The Legal Question Involved.

The sole legal question on this appeal is whether or not the damages awarded to the plaintiff in the sum of $2,000.00 were inadequate under the evidence.

Evidence.

The plaintiff, Raymond J. Veelik, testified as follows: [Rep. Tr. pp. 5-6]: That prior to going to work for the defendant on July 11, 1950, plaintiff was given a complete medical examination by said defendant, and that prior to the accident on September 14, 1954, his physical condition was excellent, and that he had never previously sustained any injuries as a result of any accident.

[Rep. Tr. pp. 8-9]: That after the accident, he found himself bundled up in a ball and in a rather awkward position in the cab of the engine, and that he felt a heavy weight on his shoulder [Rep. Tr. p. 8, lines 12-16]; that he was "dazed, dizzy, numb" [Rep. Tr. p. 9, line 6].

[Rep. Tr. p. 12, lines 18-24]: That at an emergency hospital everything was rather hazy and that he noticed blood on his shirt and that the doctor pulled a piece

of glass out of his left arm, and that he was given an antitetinus shot. He also testified that his left side started to stiffen right after the accident and that he had various other injuries about his body [Rep. Tr. p. 13].

[Rep. Tr. pp. 18-19]: That when he got home in the early hours of the morning of September 15, 1952, he "had considerable pain in that his entire left side was aching, his right leg was sore, that he had headaches and that he had shooting pains up into the back of his head."

[Rep. Tr. pp. 23-27]: Later that day, on the 15th of September, 1952, he took his wife to the Kaiser Hospital in Fontana (she was expecting to give birth) and while there, he was examined by a doctor who gave him two prescriptions to have filled and medicine to take, and at that time, in addition to the headaches and the stiffness and soreness over the rest of his body, his "back was killing me" [Rep. Tr. p. 24, lines 19-25].

[Rep. Tr. pp. 28-35]: That subsequently, shortly after midnight on September 17, 1952, he arrived at the Santa Fe Association Hospital in Los Angeles where he was hospitalized for approximately 30 days during which period of time he was examined, X-rays were taken, and treatment was given [Pltf. Exs. 8, 8A-8K]. Mr. Veelik testified that during this 30-day period of time he had pain in his neck and back [Rep. Tr. p. 35, lines 6-8].

[Rep. Tr. p. 36]: That after leaving the hospital he was placed under the care of a doctor at the San Bernardino Emergency Hospital under the jurisdiction of the defendant where he received treatment once a week until April 6, 1953, at which time he returned to the Santa Fe Association Hospital in Los Angeles where he was confined for a period of 11 days [Rep. Tr. p. 37, lines 14-22].

[Rep. Tr. p. 36, lines 18-21; p. 37, lines 2-8; p. 136, lines 12-14]: That when the plaintiff visited the Santa Fe Association Hospital on February 2, 1953, for an examination, he was told by a Doctor Lestman that it would be a period of at least 3 to 6 months from that date before his back was anywhere near normal.

[Rep. Tr. pp. 38-39]: That after he got out of the hospital the second time on April 17, 1953, he reported to the San Bernardino Emergency Hospital once a week until he went back to work for the defendant on May 20, 1953.

[Rep. Tr. pp. 41-43]: That he secured a release from the doctor in San Bernardino on May 18, 1953, to go back to work; and that after working for approximately 2½ to 3 hours in the engine he had pain in his back; that he went to see a Doctor Parks in Los Angeles about July 3, 1953 (a doctor of his own choosing) to receive an examination and treatment for said pains in his back; that the medication and diathermy treatments and injections given to him by Doctor Parks helped him considerably; that Doctor Parks' bill was $93 [Pltf. Ex. 6].

[Rep. Tr. pp. 46-48]: That he was off of work for 8 months and 6 days.

[Rep. Tr. p. 74]: That in April, 1953, a Doctor Flamson of the Santa Fe Association Hospital asked the plaintiff if he thought he was able to go back to work, and that the plaintiff told him that he didn't believe that he was.

Under cross-examination, plaintiff testified that he was not offered a release to go back to work by the doctors of the Santa Fe Association Hospital or the San Ber-

nardino Emergency Hospital except that in April, 1953, Doctor Flamson asked him if he thought he could go back to work [Rep. Tr. pp. 80-81].

Dr. Ross V. Parks testified as follows:

[Rep. Tr. pp. 87-118]: That he first saw the plaintiff on July 3, 1953; that he gave the plaintiff a thorough examination particularly to the area of the back where the plaintiff's chief complaints were; that he conducted various tests upon the plaintiff; that he found that the plaintiff complained of pain upon deep pressure being exerted upon the region of the first and second lumbar vertebra; that it was his impression that the plaintiff sustained an injury to his back as a result of the accident, being a type of whiplash injury both to the neck and the back; that subsequent examinations and tests reveal pain to always be in the same place; that he gave treatment to the plaintiff in form of physiotheraphy and massage and local injections to relieve the pain; that he found a definite localized area of pain which the patient could not have subjectively localized in the manner in which he did unless it was really there [Rep. Tr. p. 101, lines 19-25; p. 102, lines 1-4; p. 104, lines 10-16; p. 105, lines 1-6]; that there was a definite tenderness to deep pressure in the lumbar area which was located in the region of L-1 and L-2, and that the muscles were tender in that when he would press he would get some muscle spasm in that area [Rep. Tr. p. 110, lines 9-20].

Dr. George H. Patterson, called as a witness by the defendant, testified as follows:

[Rep. Tr. pp. 124-127]: That he first examined plaintiff on October 15, 1952, at the request of the defendant; that the plaintiff sustained multiple contusions and abra-

sions principally involving left side of body, including cervical strain and sprain * * * that physiotherapy might be helpful to muscles of neck and in region of cervical spine * * * that there was some tenderness in muscles of lumbar region 3 inches from spine * * * that the plaintiff complained of headache and pain across the low back area and tenderness in muscles of upper cervical region. That he re-examined the plaintiff for the second and last time on April 9, 1953.

[Rep. Tr. pp. 128-132]: That the plaintiff complained of headaches and discomfort in the low back area * * * that he was seen at this time particularly with relation to his back and lower extremeties * * * and that he did have tenderness on pressure of lumbar 1 and 2 spines * * * and that "* * * you would feel them and press on them and he said that bothered him" [Rep. Tr. p. 130, lines 12-25; p. 131, line 1].

On cross-examination Dr. Patterson testified as follows:

[Rep. Tr. p. 133, lines 22-25]: That on his examination of the plaintiff on April 9, he found tenderness of the upper low back area and that he had tenderness in the costovertebral angle right and left.

[Rep. Tr. p. 134, lines 1-8]: That on April 9, 1953, he did not recommend a release for the plaintiff to go back to work.

Documentary evidence received in behalf of the plaintiff, to wit, Plaintiff's Exhibit 7 consisting of an affidavit of the paymaster's of the earnings of Mr. Veelik and stipulated to by counsel for the defendant to be genuine and in all respects what it purports to be clearly showed the earning capacity of the plaintiff [Pltf. Ex. 7].

Argument on Inadequacy of Damages Awarded to the Plaintiff, Raymond J. Veelik.

It is submitted in behalf of plaintiff that the award of damages in the sum of $2,000.00 was inadequate under the evidence received in the case, both oral and documentary. It is well recognized that a verdict may be set aside on this ground either on appeal or by the trial court on a motion for new trial.

Grodsky v. Consolidated Bag Co., 26 S. W. 2d 618.

As a rule, a verdict in an action for a personal tort may be set aside as inadequate when it is so inadequate as to indicate passion, prejudice, partiality or where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff.

Thompson v. Ft. Branch, 178 N. E. 440;

Macias et al. v. Western Union Telegraph Co., 83 Fed. Supp. 492.

It is further submitted that a new trial may be granted not only where the amount awarded is so inadequate that it shocks the consciences and raises an inference of passion or prejudice of the jury, but also if it appears to the court from the evidence believed by it that the damages awarded were inadequate.

C. C. P. 657, subdiv. 6;

Belyew v. United Parcel Service of Oakland, 122 Pac. Rep. 2d 73.

In the case at bar, the evidence clearly reveals that the plaintiff was out of work for 8 months and 6 days and that as a result thereof he sustained a loss in earnings

of approximately $3,900.00. The evidence further showed that at no time prior to April 9, 1953, was there any suggestion made to him by any of the doctors of the Santa Fe Association Hospital or the San Bernardino Emergency Hospital that he go back to work, nor was there any release given to him by these doctors to go back to work. On the contrary, there is evidence that on February 2, 1953, the plaintiff was informed by Dr. Lestman of the Santa Fe Association Hospital that it would be 3 to 6 months before his back would be sufficiently well enough for him to go back to work. It is submitted in behalf of the plaintiff that if the doctors referred to above, after their examinations of the plaintiff, felt that he was able to go back to work that they would have ordered a release given to him and that his refusal to go back to work after such a release would result in the defendant taking whatever necessary action would be proper under the circumstances where an employee was considered well and then refused to go back to work; however, there is no such evidence in this case, and it stands uncontradicted that the plaintiff was not only unable to go back to work prior to May 20, 1953, but that after he went back to work he still had pain in his back and that as late as during the trial of this case he complained of pain in his back under certain circumstances.

The testimony of Dr. Ross Parks was to the effect that his examinations from July 3, 1953, until a few days before the trial revealed tenderness and muscle spasms in the area of lumbar 1 and 2 of the spine. The evidence is clear that Dr. Patterson, testifying for the defendant, stated that on April 9, 1953, his examinations of the plaintiff revealed tenderness and muscle spasms

in the very same area described by Dr. Parks. This was a complete substantiation of the complaint of the plaintiff.

An examination of the hospital records and reports [Pltf. Ex. 8] clearly shows the various injuries sustained by the plaintiff. It is also important to note that the plaintiff was confined to the hospital a total of 41 days, and it is submitted that the plaintiff would not have been kept in the hospital for that period of time unless his injuries were of such a nature that such hospitalization was required.

It is further submitted that counsel for the defendant, in his argument to the jury, in quoting from the hospital record, read what was purported to be something written by Dr. Richard J. Flamson, to the effect that "this man won't accept a release to work. Look at him! A perfect specimen whose actions are normal * * *" [Rep. Tr. p. 163, lines 7-14]. This was clearly prejudicial inasmuch as Doctor Flamson was not produced as a witness so that he could be cross-examined; that such statement was clearly hearsay. As stated above, plaintiff testified that Dr. Flamson asked him if he thought he could go back to work, and that plaintiff stated that he did not think he could. It is reiterated that if Dr. Flamson was of the opinion that the plaintiff was well and able to work that he would have so directed him to do so by issuing to him a release. This was never done until May 18, 1953, by the doctor in San Bernardino.

The evidence clearly shows that the plaintiff sustained a loss of earnings of approximately $3,900.00, together with a doctor bill of $93.00, and that he received substantial injuries from which he suffered considerable pain

and that he was still suffering pain as of the time of the trial. The verdict of the jury in awarding him $2,000.00 was clearly inadequate as it not only failed to cover the loss of earnings, but did not take into consideration any pain and suffering or future detriment.

Conclusion.

It is submitted that the verdict of the jury in awarding the plaintiff $2,000.00 was grossly inadequate, taking into consideration the actual loss of earnings by the plaintiff and the pain and suffering that he sustained as a result of the injuries received. It is further submitted that the verdict rendered by the jury was influenced by a statement of counsel for the defendant in his argument in his reference to Dr. Flamson.

It is respectfully urged that the judgment should be reversed and that a new trial be granted to the plaintiff Raymond J. Veelik.

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Attorney for Plaintiff and Appellant.